



BOARD OF INQUIRY (*Human Rights Code*)

NOV 12 1998

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF the complaint by Christiane Bryan dated May 18, 1993, alleging sexual harassment and reprisal.

B E T W E E N :

Ontario Human Rights Commission

- and -

Christiane Bryan

Complainant

- and -

Premark Canada Inc., Gary Colegate and Paul Stethem

Respondents

DECISION

Adjudicator : Heather M. MacNaughton

Date : November 6, 1998

Board File No: BI-0096-96

Decision No : 98-018

Board of Inquiry (*Human Rights Code*)

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APPEARANCES

Ontario Human Rights Commission)	William R. Holder, Counsel
)	
)	

Christiane Bryan, Complainant)	On her own behalf
)	
)	

Premark Canada Inc. and Paul Stethem,)	
Respondents)	
)	Paula Rusak, Counsel
)	

Gary Colegate, Respondent)	Angela Rae, Counsel
)	
)	

INTRODUCTION

The Complainant Christiane Bryan ("Bryan") alleges that in December of 1992 she was subjected to an unwanted sexual solicitation, or advance, from her direct supervisor, the Respondent Gary Colegate ("Colegate"), the National Parts Manager for the Respondent Premark Canada Inc. ("Premark"). She therefore alleges that she was the victim of sexual harassment in the workplace in breach of sections 7(3) (a) and (b) and 9 of the Ontario *Human Rights Code*, R.S.O. 1990 c.H.19, as amended (the "*Code*").

Bryan further alleges that after refusing the advance, Colegate engaged in reprisal actions against her in breach of section 8 of the *Code*.

Further, she says that the reprisal acts of Colegate resulted in her resigning from Premark due to stress. Shortly thereafter she sought re-employment with them and was refused such by the Respondent Paul Stethem ("Stethem"), the Director of Human Resources at Premark. She alleges that such refusal constituted a separate and further act of reprisal by both Premark and Stethem.

During the course of this hearing I heard evidence from Bryan; Brenda Sauve, an employee of Premark and a friend of Bryan's; Colegate; and Stethem. Where there was no discrepancy with respect to the evidence, I have made findings of fact and have not attributed the evidence to a particular source, or witness. However, where the evidence differed on any relevant matter, I have set out the nature of the discrepancy; my determination with respect to it; and my reasons for preferring the evidence of one witness over that of another.

I made findings of credibility based on my observation of the witnesses; their candour in giving their evidence; and, where possible, the extent to which other events and conduct supported their evidence.

I was mindful of the test for determining credibility set out in *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.), a test which has often been adopted by Human Rights Boards. That test is as follows:

Opportunities for knowledge, powers of observation, judgement and memory, ability to describe clearly what he [or she] has seen and heard, as well as other factors, combine to produce what is credibility....In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

THE DECISION

After careful consideration of all of the evidence, I have concluded that in each case where Bryan's testimony differs from that of Colegate, I prefer the testimony of Colegate. I was not persuaded, on a balance of probabilities, that events unfolded in Bryan's apartment as described by her, nor that the acts of reprisal she alleged Colegate had undertaken against her had occurred. While I deal with the evidence with respect to the alleged harassment separately from the evidence with respect to the reprisals, the assessment I made with respect to Bryan's overall credibility was influenced by all of the evidence that I heard. The complaint of harassment is, in the result, dismissed, as is the complaint of reprisal against Colegate. The complaints of reprisal against Premark, and Stethem, are allowed for the reasons I set out in some detail below.

History of Employment

Bryan commenced employment at Premark in June of 1988. At the time of the incidents in question she was a Parts Co-ordinator in the Customer Service Department working directly under the supervision of Colegate.

The working relationship between Bryan and Colegate was a good one and was not strictly that of supervisor/supervisee. They discussed personal matters; from time to time, Bryan would ask Colegate for small loans which she would repay on pay day; she observed his birthdays; and, on occasion, Colegate would drive Bryan to and from the office and would pick up and drop off her children at their day care.

The December Incident

Bryan alleges that on a visit to her apartment in December of 1992, Colegate initiated unwanted physical contact with her. Colegate flatly denied ever doing so. The paragraphs below detail Bryan's version of what happened that evening, followed by Colegate's version.

Bryan's Version

Bryan testified that on Saturday, December 12, 1992, Colegate called her at her home from his home in Pickering. She said that he sounded upset. He told her that he was leaving to go to the office and invited her to go out for dinner with him. She said that she was surprised at the invitation, but that she knew he was having personal difficulties with his wife because their daughter had left home. She assumed that the call related to those difficulties and that he felt an urgent need to get away from home.

Bryan testified that she told him she was unsure whether she could get a babysitter. He said he would call her from work to see if she had been successful. She was unable to locate a sitter and when he called her back, she told him that if he really needed to talk, he could come to her apartment. He told her that he would go out for dinner and then come over. He asked if he could bring her a treat. She asked him what he meant, and he said something to drink, and asked her what she liked. She told him she liked Bailey's Irish Cream.

Bryan testified that he called her on his way to her apartment and that she gave him the code to access her building. He arrived at between six and eight o'clock that evening with two small

bottles of Bailey's Irish Cream. She expected that they would discuss what was bothering him. She said that when Colegate arrived her two children were still up watching television. After the children went to bed, she said that they had a drink or two and talked, at first about work issues and then about her personal life. She said they might have talked about her attendance record at work, and about the fact that she was seeing Ross Crisp, another employee of Premark. In her evidence in chief she denied that they had discussed his daughter leaving home, but in cross-examination she acknowledged that they might have discussed it briefly.

Bryan said that they were sitting on the couch in her living room, watching the news, and that Colegate kept getting up and going to the window to look outside and then returning to the couch. She said that she made a comment about a news item and he reached over and touched her hands which were in her lap and said "we all know how you feel about that". She said his action made her feel nervous but that she said nothing. She said that she could not recall whether she pulled her hands away or got up from the couch.

Bryan testified that the next thing she remembered was Colegate's hand on the back of her head. She said he pulled her in to kiss him. He put his tongue in her mouth which, she said, brought her out of her state of shock, and she immediately got up from the couch and put a distance between them.

She recalled asking him why he wanted to do this, or what he was doing, and telling him that they had a good working relationship which she did not want to ruin. She reminded him that he had had trouble with his wife in the past, and that he did not want to jeopardize anything. She then told him that "she was attached to Ross" and that, while she was friends with other men in the warehouse at Premark, Ross was the only man she was seeing. She said that she hoped that she had not sent him any wrong signals and he responded that she had not. She told him that he should leave and he agreed. She testified that as he was leaving he said he was going to go

downtown. She asked him why and suggested that he should go home. He said he was going downtown "because he had needs".

She testified that she told him that they should forget about the incident, and that she would not hold anything against him, if he would not hold anything against her. She said he seemed genuinely sorry, and upset, so she gave him a hug goodbye and said "everyone needs a hug now and then" and he left.

Bryan testified that after Colegate left, she tried to sort out the events of the evening in her mind and became scared about what could have happened. She became so upset that she called her brother, who lived in Toronto, and told him what had happened. She did not recall much of the conversation with her brother, but she felt that she needed someone to talk to because she was not sure if she had handled the situation correctly. Her brother offered to come over, but she said there was no need because she was expecting Crisp to arrive shortly thereafter.

Colegate's Version

Colegate did not dispute that he had been at Bryan's apartment in December of 1992. He was unable to recall the date, but was certain that it was a Friday evening because it was his habit to work late on Fridays to avoid the traffic on his route home to Pickering. He said that he called Rita McGuckin, Rhonda Shaw and Bryan, all of whom worked for him, and asked each of them if they would like to go out for dinner. Bryan indicated that she would like to do so, but would have to hire a babysitter. Bryan asked him to call her back. He testified that she could not call him back because after 5:00 p.m. the office switchboard closes and callers cannot directly dial into an employee's office.

Colegate testified that he called her back and she advised him that she had been unable to hire a babysitter. She suggested that he come to her apartment and they would order dinner in. He agreed, but said that he did not want to come empty handed and asked what he could bring. She

mentioned a couple of different liqueurs, but said that Bailey's Irish Cream was her favourite. She gave him the code to access her building so that he could buzz her when he arrived.

He said that he arrived at approximately 8:00 p.m. Colegate acknowledged that he is an alcoholic. He had been taking an anti-abuse drug but had stopped taking it after his daughter left home in November. He described himself as a closet weekend drinker. He said that when he arrived at Bryan's apartment, her children were still up. They had a drink and he watched Christmas cartoons and played with the children. After the children went to bed, he and Bryan had another drink or two, for a total consumption of 3 or 4 drinks over the course of the evening.

He said that they talked about work. In particular they discussed Gene Hahn and Doris McGrath, his boss and his boss's secretary, who they both agreed were sticklers for attendance. He said that they discussed his daughter leaving home and Bryan reassured him that she would come back because Bryan had had a similar situation in her family. They talked about her divorce and how happy she had been since meeting Crisp, who was the only man in her life. He said that he was aware that Bryan and Crisp were seeing each other because Bryan had earlier advised him they were "a number", which when asked, she clarified, meant that they were seeing each other. She said that she was happy working in the parts department. He said that the subject of food was not raised, and no food was ever ordered.

Colegate testified that at approximately 10:30 p.m. he said he had better be on his way. Bryan walked him to the door, gave him a peck on the cheek, and a hug, and said everyone needs a hug now and then. He said he went directly home to Pickering and was home in time to see the late news.

Colegate adamantly denied that he had kissed Bryan, initiated sexual contact with her, or that he said that he was going downtown because he had needs.

Finding

I did not find Bryan's account of the evening credible, on a balance of probabilities, for the following reasons. First, Bryan has on three occasions changed her recollection of the date, or day, on which the visit to her apartment occurred. In her evidence, Bryan testified that the events occurred on a Saturday evening which she, at the date of her testimony, was sure was December 12. However, in her original letter to human resources about the incident (which I discuss in greater detail below), she said it occurred on Friday, December 18. She subsequently corrected her copy of the letter to human resources to read Friday, December 12. However, December 12 in 1992 did not fall on a Friday. Hence, twice Bryan had said that the incident occurred on a Friday. However, in her evidence she said that it occurred on a Saturday. I would have expected her to recall both the day, and the date, of the incident which was significant, and was, as she testified, the start of a chain of events which resulted in her resignation from Premark.

Colegate said that he did not recall the date of his visit to her apartment, but said that he was sure that it was a Friday. I found it more probable that Colegate called her from the office on a Friday evening, after working late to avoid traffic. It was not probable that on a Friday evening he would have left Toronto, driven to Pickering, called her from there and driven back to Toronto to see her. Bryan's insistence now, more that five years after the event, that it was a Saturday was not credible.

Second, Colegate gave evidence that he had called other employees on the same evening to have them join him for dinner. Bryan did not testify in chief that she was aware that Colegate had called other co-workers. However, she acknowledged in cross-examination that she was aware that he had called at least one other employee, Rhonda Shaw. This evidence supported that of Colegate, thereby lending support to his credibility, and to the fact that the evening was a Friday.

Third, Bryan did not mention in her complaint to the Commission, nor in her letter to Premark's human resources department that, at her request, Colegate had purchased two bottles of Bailey's

Irish Cream and that they had consumed a number of drinks together that evening. The fact that alcohol was consumed by them was a fact which I would have expected Bryan to disclose to the Commission, and to Premark. She may have decided not to do so in the belief that it reflected badly on her and that, in the result, her complaint might not have been believed. This pattern of failing to disclose information which she believed might reflect badly on her was repeated in Bryan's testimony at the hearing.

Fourth, in her evidence she recounted that as Colegate was leaving he said he was "going downtown because he had needs" while in her written complaint she recorded that he said he was going downtown to get a whore. In my view the use of the word "whore", and the suggestion that he was leaving her to find one, was significant, and was not something that she would be likely to forget. The fact that her oral evidence differed from her written complaint on this issue was significant, and was not explained to my satisfaction.

Fifth, I did not find credible her evidence that, after Colegate told her he was going downtown because he had needs, she gave him a hug and said "everyone needs a hug now and then". This is not the conduct of someone who testified that she was shocked and distraught by the events that evening.

Finally, in her evidence Bryan testified that after Colegate left her apartment, she called her brother. This evidence was significant in two respects. First, because she had not mentioned contacting her brother at any earlier time in her dealings with the Commission, or the Respondents, hence, apparently, he was not interviewed, nor was he called as a witness. She was unable to explain, to my satisfaction her omission of this fact. Second, earlier in her testimony when explaining her absences from work, she testified that she was a single mother with no family in Toronto to give her support. This evidence was given to engender support for her plight as a single mother. However, when she testified that she had called him in December, she directly contradicted her earlier evidence.

By contrast, Colegate gave his evidence in a forthright and clear manner and did not embellish his evidence even when he had the opportunity to do so, and his interests might have been furthered thereby. He was frank about his continuing difficulty with alcohol and the fact that he had ceased taking anti-abuse medication at the time of the December incident.

The Acts of Reprisal by Colegate

Having made the finding above, it follows that Colegate cannot have engaged in acts of reprisal pursuant to section 7(3)(b) of the *Code*, following the December incident. However, the evidence given by Bryan and Brenda Sauve regarding the acts of reprisal, and subsequent events, assisted me in determining the overall issue of credibility in this case.

Bryan testified that, following the incident in her apartment, she hoped that they would both forget about it and get on with their good working relationship. This, she said, was not to be the case. She testified that she noticed a change in the way Colegate treated her in the workplace. She gave two examples of what she alleged were acts of reprisal against her, and which led her to write to human resources. Colegate denied the acts of reprisal and, where he agreed that an event had occurred, gave another explanation for his conduct.

The Refusal of a Loan

The first reprisal incident which Bryan alleged occurred was Colegate's refusal to lend her money on December 23, 1992. Colegate denied that any request for a loan had been made. Bryan's evidence, followed by that of Colegate, is set out below.

Bryan testified that around Christmas 1992, she and a number of co-workers were discussing their Christmas shopping and what presents they had purchased for family members. Colegate said he was giving his family cash and he opened his wallet and flashed some cash at Bryan. She said that at the time she was in real financial difficulty and had no money for presents for her children, so she swallowed her pride and asked Colegate for a small loan. She said Colegate responded that

she should “go ask Ross” as she was “attached to him”. She understood his response to be her words from the evening in December being thrown back at her.

Colegate testified that on December 23 the office held a pot luck Christmas party. He said that he received a call from Bryan early in the morning at work, and she told him that she had cooked lasagna for the pot luck. She asked him if he would go to her apartment and pick her and her children up, take her children to the day care and then drive her to the office with the lasagna. He said he did so. During the course of the day he said people were talking about the difficulty of knowing what to buy for their families. He was asked what he was getting his children and he pulled out his wallet and showed three crisp new \$100 bills he had picked up from the bank that morning, and said that he had his gifts covered in one-stop shopping. He denied that Bryan asked for a loan, although he had loaned her money in the past, and he had never declined to do so when asked.

I found Bryan’s version of this event less than credible. In her evidence in chief she suggested that Colegate had flashed the money, and refused the loan, in front of a group of co-workers. However, while being cross-examined by counsel for Colegate, she indicated that it had been done in his office while there were no witnesses present. Further, if Colegate had been intent on acts of reprisal against Bryan, his undisputed conduct in picking her and her children up at her apartment, driving the children to the day care, and her to the office would be surprising and certainly not the acts of a supervisor intent on making life difficult for an employee who had refused his advances.

The Medication

The next reprisal incident Bryan testified about occurred in early January 1993. Bryan testified that on January 12, she was at home with her sick son. She said that she could not leave him to go for medication, so she called her colleague, Rita McGuckin, who started work at 9:00 a.m. and asked her if she would pick up the medication on her way to work, or get it for her on her

morning break. McGuckin said she would do it in her morning break if it was all right with Colegate. Bryan then called Colegate and asked if it would be all right and he agreed that it would be. When Bryan had not heard anything by 9:30 a.m., she called McGuckin and asked her what was going on. McGuckin said Colegate had not allowed her to go because, he said, Bryan was "attached to Ross - he can get it to her". Bryan said that she again recognized this statement as her own words being thrown back at her.

Colegate's evidence with respect to this incident was that he received a telephone call from Bryan early in the morning asking him if it was all right that McGuckin pick something up for her at the drug store on her way to work. Colegate said he had no problem with it and to give McGuckin a call. When McGuckin arrived at the office she told him that she could not get what Bryan had asked for because the drug store had not yet opened. Shortly after that, he said McGuckin asked him if she could leave work to go to the drug store for Bryan and deliver Gravol and ginger ale to Bryan at her apartment. He refused permission because Bryan's absence, and another staff vacation, meant there was no one in the department to cover the phones. Colegate himself was covering in the warehouse.

I learned during the course of the hearing that McGuckin, the only person who could shed further light on this incident, was deceased. I did however allow into evidence a statement she had written with respect to this issue. McGuckin's statement, although not subject to cross-examination, did not support Bryan's evidence. When it was put to Bryan in cross-examination that McGuckin's statement did not corroborate her version of events, she responded that "off the top of her head she did not recall that." Then, when shown the content of the McGuckin statement, she suggested that the statement was quite similar to her version and refused to acknowledge the quite obvious fact that McGuckin did not say in her statement that Colegate refused her permission to get the medication because "Bryan was attached to Ross and he could get it for her". This refusal to acknowledge the obvious detrimentally affected Bryan's credibility.

Further, I concluded that it was unlikely that Colegate, whom Bryan had alleged had already thrown her words back at her, would not have done so when she first called and sought his permission to speak to McGuckin. The fact that he agreed in the first instance, which was not disputed, suggested to me that Colegate was prepared to have a staff member assist her. This again does not appear to be the act of a supervisor intent on reprisal. I also found Colegate's explanation of why McGuckin could not leave the department credible.

Finally, during her evidence in chief, Bryan gave the impression that the request she had made of McGuckin was to obtain medication from the drug store. When Sauve gave evidence about this incident, she testified that it was a prescription that was involved. In cross-examination, I learned that what Bryan required was Gravol and ginger ale. I concluded that her use of the term medication was intended to engender support for her position, and to make the denial of her request appear more unreasonable.

It was after these two incidents of reprisal that Bryan testified that she was starting to see such a pattern of change in Colegate's attitude toward her that she felt that she should report the December incident to human resources.

The Report to Human Resources

Bryan, Sauve and Stethem all testified about Bryan's report of the December incident to human resources. Their accounts of that report were not significantly different.

Bryan prepared a letter dated January 14 for delivery to human resources. She said that the letter was precipitated because she was suffering repercussions at work, which she believed were as a result of her rejection of Colegate's advance. She said that she thought she would make human resources aware of what had happened in her apartment in case there were further, more serious, reprisals.

Bryan testified that she went to human resources on January 14, accompanied by Sauve. She handed Stethem a letter dated January 14, which referred to sexual advances that had occurred in her apartment on Friday, December 18. The letter also referred to repercussions which she was starting to experience at work which she described as "nothing drastic at this time". Bryan said that Stethem read the letter.

As discussed above, in the letter that was filed in evidence Bryan had made a handwritten change to the date of the incident. Her copy now read Friday, December 12. This change was made on February 15, 1993. It was the amended copy that was ultimately given to the Commission by Bryan.

Stethem asked Bryan why Sauve was there and was told it was for moral support. While both Stethem and Sauve agreed that a joke was made about Sauve being there as a union steward, Bryan had no recollection of it.

Bryan testified that she specifically asked Stethem to take no action with respect to her allegations because she was fairly certain that things would blow over. She said she asked him to sign and date receipt of the letter, which he did, as did Sauve.

Stethem testified that he marked on the envelope that he had received it and put it in Colegate's file. He said he honoured the request of Bryan to do nothing further at that time although he asked her a number of times to allow him to take some action on her behalf.

Sauve agreed with Stethem's evidence and said that he seemed uncomfortable with doing nothing.

Stethem testified that there was a sexual harassment policy in place at Premark and that a copy of it was posted on the lunchroom bulletin board. Sauve was familiar with the policy and agreed that it was posted in the lunchroom.

Bryan was asked about the policy in cross-examination and said she was not aware of it. When it was put to her that it was posted in the lunchroom, her evidence was that she did not have time to stand around and read things on bulletin boards. In any event, no investigation of Bryan's complaint, either under the policy or otherwise, was undertaken at that time.

Sauve's evidence was markedly similar to Bryan's allegations with respect to the events of the December incident and the acts of reprisal which gave rise to the report to human resources. This was remarkable because Sauve did not witness any of the incidents. She gave evidence about them based solely on what Bryan had told her almost five years before. Further, she repeatedly denied that she and Bryan had discussed the case, or the evidence, in the intervening period. It was, in my view, unlikely that Sauve would have such a detailed recollection of events which did not involve her, down to specific recollection of the phrases used by, and the acts of, the participants. I concluded based on this that it was not credible that she and Bryan had not discussed their evidence in detail.

EVENTS FOLLOWING THE REPORT TO HUMAN RESOURCES

The Sam Clarke Incident

Bryan testified that on January 28, Sam Clarke, a co-worker from another branch, sent a technician to Premark to pick up a part without the required paper backup. Bryan said that she called Clarke and told him that she had to have an order before she could release the part. She testified that Clarke was upset with her for wasting the technician's time.

Bryan noted the incident in her diary, and testified that because Colegate was not there when it happened, she made a point of advising him of it on his return. She said that he confirmed that she had acted appropriately.

Bryan testified that on February 3, Colegate asked her into the boardroom, where he delivered a notice of written warning regarding the Clarke incident. She said that she was shocked because

he had earlier told her that she had acted appropriately. She testified that he then proceeded to lecture her about her absenteeism.

She testified that she believed there could be only one reason for the warning, that it was an act of reprisal. She further testified that she did not know why she had been taken to the boardroom, when the meeting could have occurred in his office.

Colegate denied that Bryan had ever spoken to him about the Clarke incident prior to his delivery of the written warning. He said that he was advised by Stethem that human resources had received a written complaint from Clarke regarding Bryan's conduct on January 28. He further testified that Stethem drafted a written warning which Colegate was told to deliver to Bryan. Colegate said that he met with Bryan in the boardroom on February 3, which was her first day back in the office after an illness. He said that he elected to use the boardroom because it provided privacy which his office did not. He delivered the written warning.

Stethem confirmed that he had drafted the warning. He said that he did so because he respected Clarke's judgment as a manager and that the situation Clarke complained of was a serious one, which should have been avoided. He explained that the part that had been requested was essential to a large customer of Premark.

I find that, based on my overall assessment of their credibility, Bryan did not speak to Colegate about the Clarke incident in advance of the warning. If she had done so, I would have expected her to confront him with his earlier approval of her actions either during the discipline or afterwards, and perhaps to have responded to it in writing as she had done with respect to the criticism in her performance appraisal. Further, Bryan's evidence that Colegate told her that she had acted appropriately in dealing with Clarke is inconsistent with her evidence that he was engaging in acts of reprisal against her. It would have been an opportunity for Colegate to reject her behaviour as inappropriate. On her evidence, he did not do so.

I noted also that in her evidence in chief, Bryan described Clarke as a co-worker and when cross-examined about his position she denied that she knew he was a manager. I found this to be extremely unlikely in light of her five year history at Premark and formed the view that she chose to downplay his supervisor status in her evidence to support her position that the only reason for the warning was reprisal.

I was satisfied on the evidence of Colegate and Stethem, supported by the written complaint by Clarke, that the incident was a serious one which merited discipline. I further was unable to conclude that anything but a desire for privacy was behind the selection of the boardroom for delivery of the warning. I also noted that there was no mention of the Clarke incident, and Colegate's alleged approval of her actions in her original complaint to the Commission. While complaints are often not drafted by complainants, Bryan clearly reviewed her complaint in some detail and made a specific, initialled correction to it. When cross-examined, she had no explanation for why the Clarke incident was not mentioned in her complaint.

The Docking Pay Incident

Bryan testified that she learned from Sandy Cordeiro, a secretary in human resources, that Colegate had requested a deduction of one day's pay from her salary for acute absenteeism. Bryan's evidence, which was not disputed by the Respondents, was that she had only been absent 5 1/2 days in 1992, and did not believe that constituted acute absenteeism. We learned during Bryan's evidence in chief that her absence was because the day care which her children attended was closed on December 29. She testified that she had attempted, up until the last minute, to make alternate arrangements for her children but had been unable to do so. It was apparent from her evidence that she had known for some time about the day care being closed but had not sought pre-approval for her absence that day.

Bryan said that upon learning of the proposed deduction, she went to see Stethem who was out. She told Cordeiro that Stethem was in possession of a letter, the letter regarding the December

incident, and that it was time to bring it to light. She told Cordeiro that Stethem would know what she was talking about. Bryan said that the deduction was not processed.

Colegate agreed that he had sent a memorandum to human resources requesting a payroll deduction from Bryan's pay for her absence on December 29. He said that he did so on instructions from his supervisor Gene Hahn. Bryan had been absent on December 29, but had not been sick. He said that he was later advised by Stethem that the deduction had not been processed.

Stethem testified that on January 18, he was advised by Cordeiro that Colegate had requested a deduction from Bryan's salary for her absence on December 29, on the basis of acute absenteeism. He said that he asked Cordeiro for details about Bryan's record and concluded that the 5 1/2 days she had been absent did not constitute acute absenteeism, so he intervened and stopped the deduction.

Sauve testified that she had received a memo from Colegate asking her to process a payroll deduction for Bryan because of acute absenteeism. She testified that because of her knowledge of the December incident, and the report to human resources in that regard, on receipt of the memo she contacted Cordeiro in human resources and explained the situation, including details of what had happened in Bryan's apartment in December. She said she asked Cordeiro to contact Stethem. Sauve said that Cordeiro contacted Stethem and the deduction was not processed.

Sauve testified that the memo was received by her in either late January or early February, within weeks of the report to human resources on January 14. She said she questioned it because it was received well outside the bi-weekly pay period to which it related, and because salaried deductions were rare to begin with, she noted it and concluded that it was retaliatory in nature.

Sauve's credibility was badly shaken in cross-examination when the memo was produced and it was not addressed to her, but to human resources. Further, the date was not weeks after the report to human resources but a few days. In light of that evidence and the fact that her certainty was shaken, her conclusion that it was retaliatory was unreasonable and her evidence in chief about her involvement in the process, appeared to have been exaggerated and well beyond the scope of her responsibility or authority. Further, Sauve could not explain why she had not earlier advised the Commission's investigating officer about her involvement in this matter. She acknowledged that her notes, which she said were made contemporaneously, did not reflect any of this evidence.

I find therefore, that Colegate sought a deduction from Bryan's pay, on the instruction of Hahn, and that it was rejected by human resources, not because Stethem thought, or was concerned that it was retaliatory, but because the reason given for the request, acute absenteeism, was not supported by Bryan's attendance records.

THE RESIGNATION

There was very little discrepancy about the events surrounding Bryan's resignation. On February 4, 1993, Bryan testified that she received an e-mail from Colegate instructing her to commence cross-training within the department. The cross-training had been planned earlier. She said she understood from the e-mail that she was to start the training promptly, so she told her co-workers that they had better get started. She testified that Rita McGuckin was very upset with her and asked her why she was being so "bitchy and just because everyone else was angry with her did not mean she had to take it out on them."

Bryan testified that she was exasperated by McGuckin's response and by the stress she was feeling, and said she did not have to take "this shit". She testified that she was crying and extremely upset.

She said that she went looking for Colegate and when she could not find him, she felt the need to get out of Premark. She testified that she got her purse and coat and went back to Colegate's office. She said she opened Colegate's door; he had returned and was speaking to McGuckin. She told them did not have to take this anymore and that she was quitting and would hand in her resignation later. She said she left and slammed the door behind her.

She testified that she then went to Stethem's office, shook his hand, thanked him for her five years at Premark which she had enjoyed, and quit. She said he asked her what this was all about and she said "who cares, you won't do anything about it anyway."

She testified that she was distraught and went home, crying all the way. She said she was embarrassed and regretted her actions. She said that she was so upset that she sought medical attention. She said she told her doctor what had happened and he advised her to call the Commission.

Colegate agreed that he had requested Bryan to commence the training, which had been earlier discussed with her. He said that later that morning McGuckin came into his office, closed the door and began to tell him about the altercation between her and Bryan that morning. He said that during their discussion, Bryan came in and said she was quitting and would pick up her things and give him a letter of resignation later. He said that both he and McGuckin were in shock and did not have an opportunity to respond to Bryan before she left.

Both Stethem and Colegate testified that, after Bryan left, Stethem asked Colegate to come into his office. He disclosed to Colegate that a letter had been put in his file regarding his visit to Bryan's apartment in December. Stethem showed Colegate the letter and asked him to provide him with a written response, detailing his version of what had happened that evening. Colegate prepared a written response, and provided it to Stethem the following day. In it he acknowledged that he had visited Bryan's apartment, but denied that he had made any sexual advance.

The Request for Re-Employment

Bryan testified that subsequent to her visit to her doctor, she contacted the Commission and was advised that it was open to her to contact Premark and tell them that she wanted her job back. She said that on February 8, she contacted Stethem. She said that she explained to him that she did not mean to quit and that she had done so under duress. She said that she asked whether she could come back to work at Premark, and perhaps be transferred to another department. She said that Stethem mentioned the possibility of a lay off package, but she wanted to return to work. She said that he responded that he would have to consult with some other people and he would get back to her.

Stethem testified that Bryan called him and told him that she had changed her mind and she was not quitting after all. She said she had spoken to the Commission; knew her rights; and was seeking to return to employment in another department. Stethem testified that he told her that he would get back to her. Stethem adamantly denied that he mentioned a lay off package. He said that the term 'lay off' package was not one he commonly used; instead the commonly used term was a severance package. He testified that he would not have considered a severance package in the circumstances; after all, Bryan had quit.

Stethem testified that, in the course of considering Bryan's request for re-employment, he spoke to Colegate and asked him whether there was anything else he should know about his relationship or interaction with Bryan. In response Colegate gave him a follow-up note. When asked by Stethem, Colegate said that he did not wish her to be rehired.

Stethem testified that, on February 10, he was contacted by the Commission, and was advised that Bryan had contacted them and complained. He said that they were unable to give specifics about the nature of the complaint, except that it related to the December incident.

Stethem testified that a decision was made by Premark that they would not agree to Bryan's request for re-employment. He said that he called her on February 11 and so advised her.

Stethem testified that he had a number of reasons for not considering her for employment in another department. First, Premark had recently undergone a major downsizing and restructuring and they were not in a position to create jobs. If he moved Bryan to another department, he would have to transfer someone into the parts department. Second, he said, she had quit and had not made contact with Premark for three days. Third, he testified that her overall attendance had been a concern for some time. Fourth, he said that he was aware of a number of incidents which suggested that her interpersonal skills were lacking. In particular he was aware of the Clarke incident, and the dispute with McGuckin which gave rise to Bryan's resignation.

I heard extensive evidence about Premark's ongoing concerns about the attendance and timekeeping of Bryan and, in my view, there was little doubt that her attendance in general left a lot to be desired. She was frequently late or left early and this, combined with her absences, were difficult to handle in a small busy department.

However, Stethem acknowledged, and I concluded, that the attendance concerns were not such that Bryan could have been dismissed for them. Although attendance concerns had been mentioned in the 1991 and 1992 performance appraisals, neither Colegate nor Stethem had thought it necessary to invoke the next stage of the discipline process that was used at Premark for dealing with these types of concerns. In fact, in both of those years her overall performance was rated as between 'consistently meeting requirements' and 'above standard'.

With respect to her ability to get along with co-workers, Stethem testified that he relied on the Clarke and McGuckin incidents. It was not disputed, however, that Bryan's performance appraisals in 1991 and 1992 did not reflect a concern in this regard and in fact rated her highly regarding her ability to work with others. Further, the Clarke incident had already been the

subject of discipline in the form of a formal warning. Clearly, Premark did not consider the Clarke incident as grounds for dismissal. Nor, Stethem acknowledged, would the altercation with McGuckin on February 4 have been sufficient grounds.

There are two ways Premark could have treated Bryan's resignation on February 4: one that it was ineffective, the other that it was effective. If it was an ineffective resignation, then Bryan was entitled to return to work, subject to her conduct amounting to cause for her dismissal. If it was an effective resignation then, when considering Bryan's request for re-employment, Premark was obliged to consider it without discriminating against her on the basis that she had filed a complaint of sexual harassment and had alleged acts of reprisal for her refusal of a supervisor's advance.

Premark chose to treat the resignation as effective and agreed to consider a request for re-employment.

I was not persuaded that in considering re-employment, Bryan's complaint about sexual harassment, and the acts of reprisal she said she was experiencing, did not form part of Premark's reasons for refusing to consider re-employing Bryan. On the date of her resignation, Stethem was aware that he had, in his files, an uninvestigated complaint of sexual harassment. He had agreed to accept the complaint and place it in Colegate's file, without completing an investigation into the allegations in it. Further, while the complaint referenced acts of reprisal, it contained no details of those acts.

When Bryan resigned on February 4 in a manner which clearly indicated that she was upset, it was incumbent on Stethem and Premark to try and get to the bottom of what had caused the resignation; in particular, to assure themselves that the conduct that she had earlier complained of did not form part of her reason for resigning, or that the allegations that she had made about acts of reprisal had not escalated.

Instead, on the day she resigned, suspecting that the contents of the complaint might become an issue, Stethem asked Colegate to give to him his version of what had happened at Bryan's apartment in December. He did so: despite his earlier agreement that he would do nothing with her letter; without advising Bryan that he intended to disclose the contents of her letter; without seeking details from Bryan about her allegations of reprisal; without obtaining information from Bryan about events subsequent to her January 14 report to human resources; after providing Colegate with the contents of the Bryan complaint such that his version was in the nature of a response or denial; without giving Bryan an opportunity to respond to the alternate version provided by Colegate; and without giving either Bryan or Colegate the opportunity of providing the names of other witnesses who might have supported their contradictory versions of events. In the result, witnesses such as Sauve and McGuckin were not spoken to until much later.

These failures were a breach of the obligation that Premark owed to both Bryan and Colegate to adequately investigate the very serious allegations arising out of the events in December. My finding, after hearing the extensive evidence of several witnesses which was tested by carefully conducted cross-examination, that the complaints of sexual harassment and reprisal made against Colegate were without merit, does not prevent me from finding that Premark acted contrary to section 8 of the *Code* if its decision to refuse Bryan re-employment was made, in whole or in part, as a reprisal for having made a claim under the *Code*.

It is well settled in human rights law that when unlawful discrimination is one of the motivating factors for a respondent's treatment of a complainant, the rights of the complainant have been violated. (*Horton v. Niagara (Regional Municipality)* (1987), 9 C.H.R.R. D/4611 (Ont. Bd. Inq.) at D4615). That principle applies equally to allegations of reprisal.

In this case, the failure to investigate is key. What happened here was that Stethem concluded that he had been, in his words, "sucked in" by Bryan when he agreed to accept her letter in confidence, and this conclusion was not based on an independent assessment of the issues but

solely on Colegate's response. The problem with that result is obvious. Had Stethem conducted a proper investigation of the complaint, spoken to Sauve and McGuckin when the alleged events were still fresh in time, permitted Bryan an opportunity to respond to Colegate's version of events, and sought any other witnesses, I would probably have found that the decision not to re-hire was untainted by reprisal. Instead Stethem considered only the fact of Bryan's claims of sexual harassment and reprisal against Colegate's denial, accepted Colegate's story without any other supporting evidence, and included this as a factor in his decision not to re-hire. In my view, that constitutes a reprisal for having made a claim under the *Code*.

The *Code* will protect the misguided, perhaps even the wrongheaded, complainant from reprisal for asserting the quasi-constitutional rights it contains. At the same time the Board does not oblige employers to ignore lies and falsehoods which are the foundation of an alleged human rights claim. What the Board does require is that an employer conduct a full, fair and impartial investigation before coming to the conclusion that a claimant's story is false - an objective assessment rather than a subjective one. This was not done in this case and I must judge the actions of Stethem and Premark based on the knowledge that they had at the time of Bryan's resignation and the consideration of her request for re-employment.

Remedy and Order

I heard extensive evidence, and received numerous documents, from Bryan about her attempts to find alternate employment. She was first successful in obtaining a contractual, part-time position in June of 1993 and then in finding a permanent full-time job in October of 1996. The Commission seeks her lost wages and benefits up to and including either one of those two dates, an amount of either \$92,077.22 or \$37,290.44.

I learned however, that in either April or May of 1993, Bryan enrolled full-time in a legal assistants course at the Success Business College. It was apparent from the documentary record filed, and her evidence, that her search for work was either non-existent or not aggressive during

that period of time. I therefore find that as of the date of her enrollment in the college Bryan chose to restrict her job search activities and pursue education in an entirely new field. She is entitled to the loss of income and benefits up to the date of her enrollment as a student. Unfortunately, due to the lack of certainty in her evidence about the date of commencement of her studies I am forced to arbitrarily select a date which is fair to both the Complainant and the Respondents. I have selected May 15, 1993.

I order the Respondents to pay to Bryan her loss of salary and benefits from February 4, 1993 to May 15, 1993 together with pre-judgment interest calculated in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C.42, as amended, from February 4, 1993 to the date of this decision.

I further order counsel to meet within 20 days of the date of release of this decision in order to resolve the quantum of this award. If no such resolution is possible, I will remain seized with respect to the quantum and the parties may contact the Registrar of the Board to set a date for argument on this issue. If the amount so determined is not paid within 45 days of the date on which agreement is reached, or the date on which I determine the quantum, it will attract post-judgment interest calculated in accordance with the *Courts of Justice Act, supra*.

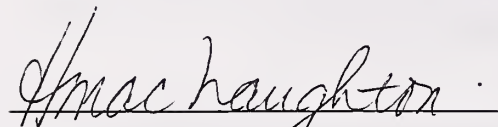
I assess the general damages in respect of Bryan's loss of the right to be free from reprisal for claiming her rights under the *Code* at \$1000.00, inclusive of pre-judgment interest.

I dismiss the claim for damages in respect of mental anguish on the basis that, with respect to the reprisal complaint, the Respondent's actions do not demonstrate the requisite degree of wilfulness or recklessness. Neither Stethem, nor Premark, deliberately intended to discriminate against Bryan contrary to the *Code*.

Stethem and Premark are jointly and severally liable for the above amounts.

The Commission also sought the following non-monetary remedies: an order to post *Code* cards on the bulletin boards within Premark; an order requiring Premark to retain a human rights consultant to develop workplace policies and procedures in accordance with the recommendations set out in the policy of the Commission entitled "Developing Procedures to Resolve Human Rights Complaints Within Your Organization." The request for the posting of *Code* cards is an appropriate one in the circumstances of this case. The request for the retention of a human rights consultant is, in my view, not an appropriate remedy. I do however order that Premark prepare a policy or procedure to resolve human rights complaints within their organization and to provide a copy of it to the Commission for its review. Once reviewed by the Commission, the policy is to be implemented in all workplaces of Premark in the Province of Ontario.

Dated at Toronto this 6th day of November 1998:

A handwritten signature in cursive script, reading "H MacNaughton", is written over a horizontal line.

Heather M. MacNaughton
Chair, Board of Inquiry